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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1977

NO. 77-5176

JEROME FRANKS,

Petitioner

v.

THE STATE OF DELAWARE,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1977

NO. 77-5176

JEROME FRANKS,

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v.

THE STATE OF DELAWARE,

Respondent

BRIEF OF THE RESPONDENT, THE STATE OF DELAWARE, IN OPPOSITION TO PETITION OF JEROME FRANKS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

I.

COUNTER-STATEMENT OF QUESTION PRESENTED

Was the trial court's denial of a testimonial hearing to the defendant on a motion to suppress evidence challenging only the veracity of the averments in the affidavit of probable cause for the issuance of a search warrant violative of the Fourth Amendment to the United States Constitution where no preliminary showing of falsity was made?

II.

COUNTER-STATEMENT OF THE FACTS

At trial the entire defense was based on voluntary consent of the victim. The defendant made pre-trial statements in which he admitted being the individual who had entered the victim's home and having had sexual intercourse with her on the date and at the time charged. (App. A-4 - TR. PPS. 215-218) The statements, not under attack here or in the Delaware Supreme Court, were admitted in evidence. The victim provided a positive in-court identification. (App. A-2 - TR. PPS. 76, 77) The defendant under oath testified that he was the one who went to the victim's home and had intercourse with her at the time and on the date alleged. (App. A-7, TR. PPS. 253, 254)

A search warrant, whose validity is not under attack on its face, was utilized by the police to uncover a coat, a pair of pants, thermal undershirt, a hat, and a knife as items which the victim initially described to them as being worn by her assailant. These items were identified by the victim at trial as being exactly like the ones worn or carried by her assailant and were received in evidence. (App. A-3, TR. PPS. 191-196)

A motion to suppress the items recovered in the search was filed by the defendant attacking the search warrant supporting affidavit on the basis of insufficient probable cause and allegations contained therein being merely conclusory. (App. B) No preliminary showing of falsity or intentional misrepresentation was made and when the matter came on for hearing, defense counsel attempted to call witnesses to challenge the veracity of the allegations contained in the affidavit stating his belief that some falsity existed. (App. A-1 - TR. P. 8) The Trial Court denied this application as well as the suppression.

III.

ARGUMENT

A. THE QUESTION PROPOUNDED IN THE PETITION FOR WRIT OF CERTIORARI ASSUMES A FACT UNSUBSTANTIATED BY THE RECORD AND FAILS TO INCLUDE FACTS PERTINENT TO THE RESOLUTION OF THE ISSUE.

Petitioner states the question presented for review as follows:

> " ***** whether the Trial Court erred in refusing to hear testimony at a suppression hearing which would have shown to be untruthful certain allegations of an affidavit made in support of a search warrant."

The record is totally devoid of any showing that the testimony referred to would have shown untruthfulness. In fact the record discloses that defense counsel proffered only his belief that falsity existed in the search warrant affidavit. (App. A-1 - TR. P. 8) Mr. Lucas, one whose information in the search warrant affidavit was believed to be false by defense counsel, did testify for the defense and substantiated the veracity of material contained in the affidavit, (App. A-6 - TR. PPS. 245-247) thereby in at least one area refuting counsel's belief. The motion to suppress and affidavit accompanying it merely recited, "6. The affidavit portion of the search warrant is merely conclusory." (App. B)

This is scarely an initial showing of falsity or other imposition on the warrant issuing judicial officer. Thus the question Petitioner would have his court resolve, by reference to conflicts in the lower courts, is not fairly presented by the facts of the case under consideration. The only such lower court conflict deals with the issue of what falsities in the affidavit would constitute cause for suppression. The following cases are demonstrative of the Point:

1st Circ. - U.S. v. Belculfine, 508 F_2 58 (1974);
2nd Circ. - U.S. v. Gonzalez, 488 F_2 833 (1973);
3rd Circ. - U.S. v. Vento, 533 F.2d 838, 858 (C. A. 3, 1976);
4th Circ. - U.S. v. Lee, 540 F_2 1205 (5/17/76);
5th Circ. - U.S. v. Thomas, 489 F_2 664;
6th Circ. - U.S. v. Luna, 525 F_2 4 (1975);
7th Circ. - U.S. v. Carmichael, 489 F_2 983 (1973);
8th Circ. - U.S. v. Marchart, 492 F_2 897;
9th Circ. - U.S. v. Bolton, 458 F_2 377;
10th Circ. - U.S. v. Harwood, 470 F.2d 322 (10 Cir. 72).

B. THE DECISION BELOW IS CLEARLY CORRECT

While never conclusive of this Court's discretion, the decision below is completely in accord with the law on the point as delineated in all the circuit courts of appeal as well as the overwhelming majority of states that have considered the matter. The law is clearly stated in State v. Petrillo, 293 A_2 649, (N.J. 1972) cert. denied 410 U.S. 945, 93 S. Ct. 1393, 35 L.Ed.2d 611 (1973) as follows:

> "Some Federal Courts and the New York Court of Appeals have indicated that a defendant may be granted a hearing with respect to the truth of a legally sufficient affidavit for a search warrant but only when there has been an initial showing of falsehood or other imposition on the [Judge]' who issued a warrant; U.S. v. Dunning, 425 F.2d 836, 839-840; (2nd Cir. 69) cert. denied 397 U.S. 1002, 90 S. Ct. 1149, 25 L.Ed.2d 412 (1970); U.S. v. Thornton, 454 F.2d 957, 966-970, (D.C. Cir. 1971); U.S. v. Halsey, 257 F. Supp. 1002 (S.D.N.Y. 1966); People v. Alfinito, 16 N.Y.2d 181, 264 N.Y.S.2d 243, 211 N.Ed.2d 644 (1965). Even these cases reject the idea that in every case on a routine demand a hearing may be granted as to the truth of an affidavit."

The factual posture of this case immediately categorizes it as one where no initial showing of falsehood or other imposition on the magistrate issuing the warrant was made. See Argument I. As such there is obviously no conflict between the decision below and the established law on the issue in Federal and majority state court decisions. As noted by the Delaware Supreme Court in its review of this case, Franks v. State, 373 A_2 578, 579:

> "The majority of the jurisdictions considering this question have decided that no attack of an underlying affidavit may be made. See 68 Am.Jur.2d Searches and Seizures §66 (1973)."

C. THE CASE INVOLVED MAY BE RESOLVED WITHOUT REFERENCE TO OR RESOLUTION OF THE 4TH AMENDMENT ISSUE ATTEMPTED TO BE PRESENTED

While investigating the complaint of rape, robbery, etc., the police received a fairly comprehensive description of the perpetrator including the clothes he was wearing at the time. With sufficient probable cause a search warrant was obtained and executed recovering the items later moved to be suppressed. Subsequently the defendant gave the police two statements admitting his identity as the one of whom the victim complained. (App. A-4 - TR. PPS. 215-218) Defense counsel in his opening address to the jury did not deny intercourse between defendant and victim but advanced the issue of adults mutually consenting to the act. (App. C) The victim positively identified the defendant at trial (App. A-2 - TR. PPS. 76-77) and the defendant under oath admitted his identity as the participant in the intercourse with the victim. (App. A-7 - TR. PPS. 253, 254) The introduction of the clothing and knife, fruits of the search

warrant, could not by any stretch of the imagination, have had any influence on establishing the identity of the defendant which was the only possible purpose of the introduction of the questioned items at trial. Thus error if any was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18, resulting on a resolution of this case without recourse to the 4th Amendment constitutional question. Certiorari in such case would be improvidently granted. Alma Motor Co. v. Timken Co., 329 U.S. 129.

D. THIS COURT HAS CONSISTENTLY DENIED CERTIORARI ON THE ISSUE IT IS CALLED UPON TO DECIDE BY THIS CASE

In this area Respondent directs the Court's attention to, among others, the following cases: People v. Bak, 400 U.S. 882, 258 N.E.$_2$ 341, 91 Set. 117, 27 L.Ed.2d 121 (1970); State v. Anselmo, 407 U.S. 911, 92 S. Ct. 2438, 32 L.Ed.2d 685 (6/12/72); Tucker v. Maryland, 386 U.S. 1024, 87 S. Ct. 1381, 18 L.Ed.2d 463 (67); Smith v. N.J., 336 U.S. 925, 69 S. Ct. 656, 93 L.Ed.2d 1087 (49); Stansberry v. Ill., 404 U.S. 873; Petillo v. N.J., 410 U.S. 945, 93 S. Ct. 1393, 35 L.Ed.2d 611 (73).

The instant case in view of the foregoing infirmities must present less persuasive reasons for this Courts consideration than many of the cases previously denied certiorari.

IV. CONCLUSION

For the reasons stated above, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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DATED: August 17, 1977

APPENDIX A

1. Transcript Record P. 8
2. Transcript Record PPS. 76-77
3. Transcript Record PPS. 191 - 196
4. Transcript Record PPS. 215-218
5. Transcript Record PPS. 220-221
6. Transcript Record PPS. 245-247
7. Transcript Record PPS. 253-254

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MR. FINOCCHIARO: Yes, Your Honor. Would you like for me to limit myself -- or, first of all I will address what Colonel Turner has stated.

THE COURT: Not yet. Why don't you make your proffer and then we can delineate the issues.

MR. FINOCCHIARO: Your Honor, I intend to produce Mr. Wesley Lucas of the Delaware Youth Center and Mr. James Morrison, formerly of the Delaware Youth Center, who I believe will give information that will intend to impeach the information contained in the affidavit, not only as to its accuracy but to the fact it was never given and as such there may have been a rather material misrepresentation made by either one or both of the affiants contained in the search warrant. In addition, I would like to call Officer McClements to the stand.

THE COURT: That would be of what paragraph? Paragraph 15?

MR. FINOCCHIARO: Yes, Paragraphs 15, 16 and 17.

THE COURT: And what they would testify to would rebut what is in Paragraph 15, 16 and 17.

MR. FINOCCHIARO: Would rebut not only certain

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were found not to be impermissibly, or not inadmissible I should say.

THE COURT: The issue for me at the present time is that of a request for voir dire. The request for voir dire is hereby denied. However, I am not denying the opportunity to the Defendant to make a later motion to strike at any time, either at the end of the State's examination of the witness or on cross-examination by the Defendant. Anything further, counsel?

MR. FINOCCHIARO: No, Your Honor.

THE COURT: The witness may return to the stand and the jury may come into the courtroom.

(The witness resumed the stand.)

(The jury returned to the courtroom.)

BY MR. TURNER:

Q Now, Mrs. Bailey, is the individual who intruded into your home and is the subject of what I have related present here in the courtroom?

A Yes.

Q Would you point him out, please?

A This person here (indicating).

MR. TURNER: Let the record reflect that the witness has pointed out the Defendant and identified him.

BY MR. TURNER:

Q. Approximately how long did you have an opportunity to observe him when the lighting conditions had reached daylight?

A. As far as I can recall it could have been no longer than ten to fifteen minutes.

Q. Now, when the refrigerator door was open, did you have an opportunity to observe him at that time?

A. Yes. That is when I first made notice especially of the clothing.

Q. And approximately how long was that?

A. One minute.

Q. Now, at all times throughout this entire period what was the furtherest away you were able to get from the Defendant throughout the entire period?

A. Probably a distance of four feet at the most.

Q. At the most?

A. Yes.

Q. That is he was constantly with you throughout the entire period you have related?

A. Yes.

Q. Now, you were with him approximately one and a

sorry -- but he didn't know a Bailey.

BY MR. TURNER:

Q Now, on March 9 what did you do in connection with this investigation reference to search warrant?

A We executed a search warrant on Jerome Franks' apartment at 222 South Governor's Avenue at which time clothing was confiscated matching the description of the clothing that the suspect in the rape had been wearing.

Q At this point I show you State's for Identification A and ask you what significance this might have to you?

A This was confiscated during the execution of the search warrant.

Q Can you identify that as being the object of the search warrant or recovered on the search warrant?

A Yes, sir, I can. It bears an evidence tag filled out by myself.

Q By whom?

A By myself.

MR. TURNER: At this point I move State's Identification A into evidence as Exhibit 1.

MR. FINOCCHIARO; Your Honor, I believe my

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objection has previously been made on the basis of the search, and I object to it on that ground. In addition, I question the fact that Mrs. Bailey is not sure precisely that it was -- could not identify this as being something other than similar to what that alleged intruder was wearing. For those two reasons I object to its entry.

THE COURT: What purpose is it being introduced?

MR. TURNER: It is being introduced in conjunction as proof of what was found on the search warrant, answering the description that this officer had of the clothes that were worn by the Defendant.

THE COURT: Objection overruled. It will be admitted into evidence as State's Exhibit No. 1.

(White thermal undershirt previously marked "State's Exhibit A, for Identification" marked "State's Exhibit No. 1" and received in evidence.)

BY MR. TURNER:

Q I now show you State's for Identification B and ask you what significance that has to you?

A This was also found in Jerome Franks' apartment. during the execution of the search warrant. It bears the evidence tag that I filled out at the time.

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MR. TURNER: Move State's for Identification B into evidence as State's Exhibit 2.

MR. FINOCCHIARO: Again, Your Honor, I have the same objections as previously stated.

THE COURT: Objection overruled. It will be admitted into evidence as State's Exhibit No. 2.

(Hat previously marked "State's Exhibit B, for Identification" marked "State's Exhibit No. 2" and received in evidence.)

BY MR. TURNER:

Q I now show you State's for Identification C and ask you if you can identify that.

THE COURT: B for Identification will be admitted for the same purpose as A?

MR. TURNER: Yes, Your Honor.

THE WITNESS: This was also found in Jerome Franks' apartment by myself and marked as evidence. It bears my evidence tag.

MR. TURNER: Move to introduce into evidence State's Exhibit C as State's 3.

MR. FINOCCHIARO: Again, Your Honor, the same objections.

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THE COURT: And introduced for the same purposes as A and B?

MR. TURNER: Yes, Your Honor.

THE COURT: Objection overruled. It will be admitted into evidence as State's Exhibit No. 3.

(Pants previously marked "State's Exhibit C, for Identification" marked "State's Exhibit No. 3" and received in evidence.)

BY MR. TURNER:

Q State's for Identification D, what significance does that have to you?

A This was also found in Jerome Franks' apartment by myself and does bear my evidence tag.

MR. TURNER: Move to introduce into evidence State's for Identification D as State's Exhibit 4.

MR. FINOCCHIARO: Your Honor, same objections.

MR. TURNER: Same reasons.

THE COURT: Introduced for the same purposes?

MR. TURNER: Yes, Your Honor.

THE COURT: Objection overruled. It will be admitted into evidence as State's Exhibit No. 4.

((Coat : previously marked "State's Exhibit D,

for Identification" marked "State's Exhibit No. 4" and received in evidence.)

BY MR. TURNER:

Q I now show you State's for Identification D -- I'm sorry, E, and ask you what significance that may have to you.

A This was found on the kitchen table of Jerome Frank' apartment during the execution of the search warrant marked with my evidence tag.

MR. TURNER: Move for introduction as State's Exhibit 5, State's for Identification E.

MR. FINOCCHIARO: Your Honor, I object to it on the same grounds. In addition, I believe that Cynthia Bailey indicated that she saw a knife in pitch blackness and apparently merely gave a description of it as being a knife. I question the evidenciary value of something found in the apartment without something more to designate that was the one allegedly used.

MR. TURNER: That is a jury question, the weight to be attached to it, Your Honor.

THE COURT: What purpose is it being introduced?

MR. TURNER: I represent it is being introduced

for the same purpose as all the other exhibits as found in the search warrant by this officer as being under a description that he had at that time.

THE COURT: For that purpose it will be admitted into evidence as State's Exhibit No. 5.

(Knife previously marked "State's Exhibit E, for Identification" marked "State's Exhibit No. 5" and received in evidence.)

BY MR. TURNER:

Q Now, in connection with State's Exhibit No. 5, did you thoroughly search the Defendant's Jerome Franks' apartment at the time you executed the search warrant?

A Yes, sir, I did.

Q Was any other knife evidence in the apartment at that time?

A No, sir, there wasn't.

Q This was the only knife?

A Yes, sir.

Q In connection with State's Exhibit 3, is there anything significant about the belt and buckle attached to that as related to your investigation?

A Mrs. Bailey described the pants worn by the

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MR. FINOCCHIARO: I think my position is quite simply we only have one thing in black and white, only one type of document which can't be changed. It is there. That indicates only two rights were given.

As such, I think it is a violation of Miranda rights. I think we do have a situation -- the Court is obviously aware and I am not making any suggestion about Detective Brooks, but anyone anywhere could say they said a particular thing and there is no way to contradict them. Here, however, we do have something in writing which indicates quite frankly that two of the rights were not given. I think that should be controlling under these circumstances.

THE COURT: State's motion is granted.

(End of voir dire examination.)

THE COURT: Bring in the jury.

(The jury returns to the courtroom.)

DIRECT EXAMINATION (Cont'd)

BY MR. TURNER:

Q Detective Brooks, just prior to the jury retiring I had asked you on Wednesday, March 10, in the early afternoon, did you contact the Defendant at the

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Delaware Correctional Center?

A Yes, sir, I did.

Q Now, what conversation did you have with the Defendant at that time?

A I first told Mr. Franks that I was there because I was investigating a rape in Dover and he was a suspect in it at that time. I then advised him that I would like to talk to him, but he had the right to remain silent, anything that he chose to say could and would be used against him in court at a later time, that he had the right to have an attorney present prior to my asking him questions and that if he could not afford an attorney the State of Delaware would provide one for him prior to him answering questions.

Q What was his reply?

A He replied that he didn't want an attorney, that he knew his rights better than I did and I proceeded to ask him questions.

Q What questions did you ask him? What were his answers?

A He at first told me that he didn't know anything about any rape and didn't know anybody by the name of

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Cynthia Bailey. At that time I told him quite frankly I didn't believe him. We had executed a search warrant of his apartment and that I had found clothing fitting the description given by our victim and that I felt that I could place him at the house and it was at this time that he told me that Yes, he was at the house, that he had been there 5:00 in the morning on the fifth of March because he was aware that Mrs. Bailey's husband worked at night.

He had told me that he had met her up around Wesley College prior to this and talked shortly with her then and had seen her on several occasions since then, enough to say hello and wave and that he wanted to go over there and talk to her that morning.

When he got to the house he stated he found the back door open, but he didn't go in. He knocked on the door and Mrs. Bailey answered the door, was dressed in a nightgown and invited him inside and it appeared she hadn't been in bed.

They went to the living room, conversed for quite a while at which time the talk led to sex and she invited him upstairs at which time they had sex orally, anally and natural intercourse and that shortly after that

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this time I would like to get a clarification of the ruling at the bench if I may.

THE COURT: Yes.

(Side bar conference not reported.)

BY MR. TURNER:

Q Now, Detective Brooks, you have testified you went to the Delaware Correctional Center in response to a message from the Defendant wanting to see you. When you arrived there and after initial conversation what rights if any did you explain to the Defendant?

A I again advised him that he had the right to remain silent, that anything he chose to say to me could and would be used against him in court at a later date, that he had the right to have an attorney present prior to my asking him any questions and if he couldn't afford an attorney the State of Delaware would provide him one prior to him answering questions.

Q Now, then what conversation ensued?

A At this time Jerome told me that he had forgot during our first conversation to tell me that Mrs. Bailey when she answered the door was wearing a very short tight nightie which showed most of her body and that the

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sex that they had was with her consent, that he had never forced her to do anything and that he had never employed any knife against her to terrorize her in any way.

Q And what was your reaction to that?

A I told him that I didn't believe that, that my investigation seemed to point otherwise.

We then conversed about it more and Jerome finally admitted to me that he hadn't really been let into the house by Mrs. Bailey that morning, that he had gone there, he had found the back door open and he had gone into the house.

Once inside the residence he removed a storm window screen from one of the downstairs windows in the dining room of the house and he put it against a building outside, against the side of the house. He intended to take that screen back to his apartment to repair a window back there he had broken.

He said he then went to the second floor of the residence where he found Mrs. Bailey in bed asleep and she awoke. They started a conversation at which time she consented to have sex with him. They had sex as he previously described in his first conversation with me

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fashion?

A No, not that I could notice.

Q Was there any noticeable difference between Mr. Franks on March 5, 1976 as opposed to any other day?

A Not that I could determine.

Q Was he acting peculiar in any fashion that you could determine?

A No.

Q To the best of your knowledge did he work all day?

A On that night?

Q He did go to work at approximately 7:30; is that right?

A That's correct.

MR. FINOCCHIARO: I have no further questions.

CROSS-EXAMINATION

BY MR. TURNER:

Q Mr. Lucas, isn't it true that Mr. Franks frequently wore a thermal undershirt and a brown jacket and a dark green knit hat?

A Yes, I have seen him wear that.

Q And, Mr. Lucas, at the Youth Center what is

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your particular capacity?

A I have been the chief counselor for the six years that it has been open.

Q Now, when Mr. Franks worked there he didn't work under your direct supervision, did he?

A No, he did not.

Q As a matter of fact, you were in an office most of the time, were you not?

A I was either in the office or in the cell block working.

Q And Mr. Franks was working out of your vision most of the time?

A I guess I would have to say yes.

Q Do you recall on March 4, that is the date before you have testified to, if Mr. Franks was wearing a white thermal undershirt and a green knit cap?

A I recall the white thermal shirt, but I do not recall the green cap.

Q How about the leather jacket?

A I have seen him wear the leather jacket frequently.

Q On Thursday, March 4, do you recall that he was

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wearing this leather jacket, State's Exhibit 4?

A Yes, I recall that.

Q He was wearing that March 4?

A Right.

Q Do you recall on March 4 -- State's Exhibit 1 -- a white thermal undershirt. Do you recall whether he was dressed in something like that on March 4?

A Something like that, yes, sir.

MR. TURNER: No further questions.

REDIRECT EXAMINATION

BY MR. FINOCCHIARO:

Q Mr. Lucas, you quite frequently saw Mr. Franks wearing other things, too, didn't you?

A That's correct.

Q Is there any way you can characterize or give a number as to how often he might have worn a particular shirt?

A You are talking about the white shirt?

Q Would you say he wore different things quite often?

A Yes, he didn't wear the same thing everyday.

MR. FINOCCHIARO: No further questions.

consultation with a lawyer, would also be inadmissible. Since the Court ruled initially it was admissible, I did not go any further in that area.

I would also like to state that when the Attorney General offered into evidence the written statement I stated no objections. It is in terms of no objections in addition to what I previously stated during my voir dire.

THE COURT: All right. So noted for the record. Anything further before the jury comes in?

MR. FINOCCHIARO: I have nothing further.

THE COURT: You may bring in the jury.

(The jury entered the courtroom and took their respective seats in the jury box.)

MR. FINOCCHIARO: Your Honor, Defense would call Jerome Franks.

JEROME FRANKS

JEROME FRANKS, called on his own part and behalf, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FINOCCHIARO:

Q. Mr. Franks, before I go any further I think

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DOVER, DELAWARE 19901

there is a question that the ladies and gentlemen of the jury have on their mind. Did you have sexual intercourse with Cynthia Bailey on March 5, 1976?

A Yes, I did.

Q Was this intercourse voluntary or involuntary?

A It was voluntary.

Q Was there any type of force used?

A No, sir.

Q Did you employ a knife?

A No, sir.

Q Let's back up for a moment. Mr. Franks, how old are you, sir?

A 21.

Q I think you may have to speak up just a little bit.

A 21.

Q Where do you live?

A 222 South Governor's Avenue.

Q And where is that in relation to 132 North Street?

A About one hundred yards away.

Q And where are you employed?

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DOVER, DELAWARE 19901

APPENDIX B

Motion to Suppress Evidence and Supporting Affidavit

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

THE STATE OF DELAWARE,	:	
Plaintiff,	:	CR. A. NO. IK-76-03-0120, -0121, -0122.
vs.	:	
JEROME FRANKS,	:	
Defendant.	:	

MOTION TO SUPPRESS EVIDENCE
AND REQUEST FOR HEARING

COMES NOW, the Defendant, Jerome Franks, through his attorney, David D. Finocchiaro, Assistant Public Defender, in the above-captioned case, and moves, pursuant to Rule 41(e) of the Superior Court Criminal Rules, to suppress any evidence seized from him as a result of a search of his residence, occurring on or about the 9th day of March, 1976. Said search resulted in the seizure of items of clothing, a knife, and miscellaneous items.

The search and seizure was unlawful for the following reasons:

1. On or about March 9, 1976, the Defendant, Jerome Franks, was residing at 222 S. Governors Avenue, Apartment #3, Dover, Delaware.

2. On or about March 9, 1976, members of local police forces conducted a search of his residence.

3. No permission was given by the Defendant or anyone to permit a search of his apartment.

4. The search was not incident to a lawful arrest.

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5. The search warrant used was legally insufficient in that it did not show sufficient probable cause.

6. The affidavit portion of the search warrant is merely conclusory.

7. Said search resulted in the seizure of items of clothing, a knife and miscellaneous items.

8. Certain items seized were not in plain view.

WHEREFORE, the Defendant, pursuant to Rule 47 of the Superior Court Criminal Rules, requests a hearing for the Court to consider if the aforesaid search and seizure was in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States and of Articles 1 and 6 of the Delaware Constitution of 1897, as amended.

David D. Finocchiaro

DAVID D. FINOCCHIARO
Assistant Public Defender
101 Court Street
Dover, Delaware 19901

DATED: 7/27/76

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

THE STATE OF DELAWARE,	:	
Plaintiff,	:	CR. A. NO. IK-76-03-0120, -0121, -0122.
vs.	:	
JEROME FRANKS,	:	AFFIDAVIT IN SUPPORT OF MOTION TO SUPPRESS
Defendant.	:	

STATE OF DELAWARE)
) SS.
COUNTY OF KENT)

BE IT REMEMBERED, that on this___day of_____, A.D., 1976, personally appeared before me, the Subscriber, a Notary Public for the State and County aforesaid, JEROME FRANKS, being duly sworn, depose and say:

1. That on or about March 9, 1976, the Defendant, Jerome Franks, was residing at 222 South Governors Avenue, Apartment #3, Dover, Delaware;

2. That on or about March 9, 1976, members of local police forces conducted a search of his residence;

3. That no permission was given to permit a search of his apartment;

4. That the search was not incident to a valid arrest.

5. That the search warrant used was legally insufficien in that it did not show sufficient probable cause;

6. That the affidavit portion of the search warrant is merely conclusory.

7. That said search resulted in seizure of items of clothing, a knife, and miscellaneous items.

8. That certain items seized were not in plain view.

JEROME FRANKS

SWORN TO AND SUBSCRIBED by me the day and year aforesaid.

, Notary Public

APPENDIX C

Excerpt from Defendant's opening statement.

SUPERIOR COURT REPORTERS
KENT COUNTY COURTHOUSE
DOVER, DELAWARE 19901

August 2, 1976
Superior Courtroom
2:12 o'clock p.m.

PRESENT: As noted.

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MR. FINOCCHIARO: . . . Now, as suggested by the prosecutor, I believe that the ultimate issue today or tomorrow, as the case may be, will not necessarily be whether there was intercourse or not as it may be in some cases, but whether or not what was done was done by two consenting adults or, in other words, was it voluntary? Was it involuntary? Was there force used? Was there no force used? These are the elements that are going to have to be decided ultimately by you throughout this trial.

Now, the defense will present its version of what happened on March fifth. I would predict that in certain areas it may coincide with that of the State and in other areas it may differ rather dramatically.

Now, in doing so defense will tell what Mr. Franks did or did not do on March fifth. I think what may be equally as important is what Cynthia Bailey did or did not do. This gentleman is sitting here today presumed innocent.

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